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IN THE

Supreme Court of the United States

COMMONWEALTH EDISON COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF PETITIONER

GEORGE E. HUTCHINSON
EXECUTIVE DIRECTOR
FEDERAL CIRCUIT
BAR ASSOCIATION
1300 I Street, NW
Suite 700
Washington, DC 20005
202.408.4000

ANDREW G. MCBRIDE
(*Counsel of Record*)
SCOTT M. MCCALEB
ALLYSON P. NEWTON
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000
Counsel for Amicus Curiae Federal Circuit Bar Association

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INTEREST OF AMICUS CURIAE

The Federal Circuit Bar Association ("FCBA") is a national organization comprising approximately 2,400 attorneys whose practices concern the United States Court of Appeals for the Federal Circuit in all aspects of its jurisdiction. The FCBA offers a forum for the discussion of legal issues of common interest and dialogue between the bar and the judges of the Federal Circuit. One purpose of the FCBA is to offer assistance and advice to the federal courts, including filing briefs *amicus curiae*, on matters affecting practice before the Federal Circuit and lower tribunals.[1]

Pursuant to Supreme Court Rule 37.2(a), the FCBA has conferred with the parties regarding the filing of this brief *amicus curiae*, and both have consented to its filing. The parties' letters of consent are on file with the clerk.

The FCBA respectfully submits this brief in support of the petition for certiorari filed by Petitioner Commonwealth Edison Company.[2] The FCBA seeks to offer a practitioner's perspective on the impact of the Federal Circuit's decision in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) ("*Commonwealth Edison*") on the government's contracting partners.

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[1] Pursuant to Supreme Court Rule 37.6, the FCBA states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of the brief.

[2] The FCBA likewise supports the petitions for certiorari in the following related cases decided on the bases articulated in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001): *Omaha Pub. Power Dist. v. United States*, No. 01-1398; *Maine Yankee Atomic Power Co. v. United States*, No. 01-1155; and *Sacramento Mun. Util. Dist. v. United States*, No. 01-1020.

SUMMARY OF THE ARGUMENT

The decision below has sown and will sow substantial confusion in an area of law where certainty is at a premium—the myriad procurement and service contracts the United States must enter with private enterprise. *Commonwealth Edison* is at odds with this Court's jurisprudence regarding the constitutionality of retroactive legislation and with the Court's repeated pronouncements that the government cannot use its power as sovereign to rewrite its contractual relationships with private parties.

The test adopted by the *en banc* Federal Circuit effectively gives the Government *carte blanche* to retroactively alter its own contractual rights and obligations in commercial transactions closed long ago. The lower court's focus on the "benefit" to the party complaining of the retroactivity is misplaced in the area of government contracts. Every government contractor will have received some benefit as part of the mutuality of consideration necessary to form a contract in the first place. Moreover, rather than focusing on the reasonable expectations of the parties *under the contract,* the Federal Circuit cited general regulatory trends and the heavily regulated nature of the industry to effectively trump express contractual terms. This analysis is contrary to the approach of five Members of the Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where the lack of any contractual provisions for lifetime health benefits at the time of the transactions was central to the conclusion that Eastern Enterprises could not be forced to bear retroactive liability for such costs. Where parties enter into fixed-price contracts with the United States for services or for the delivery of goods, they are entitled to rely upon settled contract law which clearly provides that no further monetary liability can be assigned to the transaction.

These critical errors led the Court below to endorse retroactive legislation—certain provisions of the Energy

Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 ("EPACT")—that is substantially more severe, especially in monetary effect, than that rejected by the Court in *Eastern Enterprises*. Because of these errors and the substantial importance of the issues, this Court's intervention is essential. The Court need not and should not await a circuit conflict where the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act makes such a conflict unlikely. Moreover, much like the situation in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the Court's guidance is needed in order to resolve the dozens of related cases pending in the Court of Federal Claims.

Finally, this case presents the Court with an excellent vehicle to resolve several issues that have troubled the lower courts after *Eastern Enterprises* and *Winstar*. The court below issued a categorical ruling that the Takings Clause does not apply to the exaction of money payments to the United States. In addition, the lower court's ruling that no vested contract right is involved in this case rests on a clear misapplication of the sovereign acts doctrine as applied in *Winstar* and numerous previous government contract cases. For these reasons, the FCBA respectfully urges the Court to grant review of the decision below.

ARGUMENT

I. *COMMONWEALTH EDISON* ENDORSES RETROACTIVE SELF-DEALING BY THE GOVERNMENT IN CONTRAVENTION OF THIS COURT'S FIFTH AMENDMENT AND GOVERNMENT CONTRACTS PRECEDENTS.

It is a fundamental principle of this Court's Fifth Amendment jurisprudence that the retroactive reassignment of rights and duties is highly disfavored. This principle finds expression in the emphasis the Court has placed on

reasonable, investment-backed expectations in its Takings Clause jurisprudence, *see Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and in due process cases that reject retroactive laws that "change the legal consequences of transactions long closed." *See Eastern Enterprises,* 524 U.S. at 548 (Kennedy, J., concurring in the judgment and dissenting in part). Where the government rewrites the obligations of a fixed class of persons based upon past commercial activities or completed transactions, the danger that the government is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States,* 364 U.S. 40, 49 (1960), is at its zenith. Moreover, because the affected class had neither notice nor an opportunity to alter its conduct to avoid liability, the Due Process Clause's protection against arbitrary and fundamentally unfair government action is directly implicated.

These Fifth Amendment principles apply (and have been repeatedly vindicated by this Court) where the party affected by retroactive legislation is not in privity with the United States. *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The dangers of retroactive legislation are vastly magnified where the Government alters the obligations of its own contracting partners after the fact. This Court has unfailingly distinguished between legislation that is "relatively free of government self-interest" and legislation that impermissibly "seeks to shift the cost of meeting [the Government's] legitimate public responsibilities to private parties." *See Winstar*, 518 U.S. at 896; *Perry v. United States*, 294 U.S. 330, 350-51 (1935). "The greater the Government's self-interest . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence . . . ." *Winstar*, 518 U.S. at 898.

The decision below creates significant tension with *both* settled Fifth Amendment principles against retroactive legislation *and* the doctrine that the government should not be able to employ its power as sovereign to advance its narrow commercial interests at the expense of its contracting partners. The *Commonwealth Edison* court decided that the Nation's utilities, which acquired or used enriched uranium from their contracting partner, the United States, through fixed-price contracts dating as far back as the 1950s, can collectively be required to pay up to $2.25 billion for the decontamination and decommissioning of the government facilities that enriched the uranium. The Federal Circuit's decision has particularly grave consequences for those who contract with the Government, as they can no longer rely on the well-settled legal standards that have traditionally governed those contractual relationships.

A. *Commonwealth Edison* Compounds The Uncertainty Left By *Eastern Enterprises* Over When Severely Retroactive Exactions Violate The Fifth Amendment.

Commonwealth Edison represents a marked and significant departure from the traditional standards for assessing the constitutionality of retroactive legislation as applied to the Government's contracting partners. The FCBA respectfully submits that this departure will invite the Government to abuse its power as sovereign to rewrite its contractual obligations with private parties, long after both sides have fully performed them. In fact, the court expressly declined to give any weight to the contractual relationship between the Government and Commonwealth Edison in assessing the merits of the utility's Fifth Amendment claims. *See Commonwealth Edison*, 271 F.3d at 1348.

This approach departs from settled law governing the rights and obligations that arise from government contracts.

"[T]he power of the Congress to control or interdict the contracts of private parties" differs significantly from "the power of the Congress to alter or repudiate the substance of its own engagements." *See Perry*, 294 U.S. at 350-51. Where, as here, retroactive liability is imposed on the basis of privity with the Government, that contractual relationship should be crucial to the due process analysis. Indeed, due process challenges arising out of the Government's "impairment of its own [contractual] obligations" may even warrant a more stringent standard of review. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 471 & n.24 (1985). The Federal Circuit's decision to discount this critical factor entirely cannot be squared with the Fifth Amendment precedents of this Court.

In fact, *Commonwealth Edison* makes it easier for the Government to rewrite its own contractual obligations than to adjust contractual rights among private parties. Under the Federal Circuit's new test, even "severely retroactive and costly" legislation targeting the Government's own contractual relationships must be upheld if the contractors: (1) "benefited" from the Government's performance, and liability is not "disproportionately imposed"; and (2) had "reasonable expectations" that their purchase of government services would expose them to future liability for costs incurred by the Government in performing the contracted services. *See Commonwealth Edison*, 271 F.3d at 1346.

The first prong will be satisfied in virtually every government contract case, no matter how arbitrary or unfair the legislation: The mutuality of benefit that serves as consideration to support every contract is sufficient, in the Federal Circuit's view, to justify the imposition of enormous retroactive liability. *See id.* This cannot be the law. The existence of a contractual relationship with the United States (and the failure to assign this particular cost to the contractor) should be a critical (if not decisive) factor *against* allowing the Government to impose retroactive liability. The

Federal Circuit's position means that government contracts receive *less* protection against the retroactive alteration of obligations than do contracts between private parties.[3]

Likewise, *Commonwealth Edison's* application of its "reasonable expectations" test ignores that where, as here, a private party has entered a contract with the Government, vague considerations such as whether the party operates in a "highly regulated industry" or could have "reasonably anticipated" retroactive legislation, *see Commonwealth Edison*, 271 F.3d at 1348, should be beside the point. Rather, the contractor's "reasonable expectations" should be deemed to arise, as a matter of law, from the contract itself.[4] Given that a contract need not contain any "second promise" by the Government not to demand more for its services *after* performance, *see Winstar*, 518 U.S. at 887, it makes little sense to say that a contractor may nonetheless be deemed to have "expected" retroactive liability imposed on the basis of that contract. In other words, "[w]hile it is true enough . . . that one who deals with the Government may need to '"turn square corners,"' . . . he need not turn them twice." *Id.* at 922 (Scalia, J., concurring in the judgment).[5]

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[3] The inquiry into whether the retroactive liability is "disproportionate" to the benefit is similarly misplaced in this context. The contract itself assigned burdens and benefits regarding the transaction at issue—*any* subsequent reassignment of risks and benefits that were known to exist at the time of the contract is "disproportionate."

[4] In *Kaiser Aetna*, a government permit to develop a pond, although not a contractual undertaking, was a government promise sufficient to create reasonable, investment-backed expectations that the government was bound to respect. *See* 444 U.S. at 179. *A fortiori* an express contract between the government and a private party concerning the very transaction at issue should be the central factor in judging the expectations of the parties to the contract.

[5] In *Eastern Enterprises*, five Members of the Court concluded that retroactive liability violated the Fifth Amendment in large part because Eastern Enterprises itself had exited the coal mining business before any contractual promises of lifetime benefits had been made to the miners. *See* 524 U.S. at 535 (plurality opinion); *id.* at 550 (Kennedy, J.,

These errors are symptomatic of the confusion that has reigned in the lower courts since *Eastern Enterprises* issued. Courts have had great difficulty in applying both the Takings Clause and the Due Process Clause to retroactive legislation in light of *Eastern Enterprises* and have not been able to distill any core principles from Justice O'Connor's plurality opinion combined with Justice Kennedy's concurring opinion. *Compare United States Fid. & Guar. Co. v. McKeithan*, 226 F.3d 412, 420 (5th Cir. 2000) ("Justice Kennedy's due process analysis focuses on retroactivity and is essentially harmonious with the reasoning of the other four justices."), *with Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998) ("[T]he only binding aspect of *Eastern Enterprises* is its specific result."). Because the retroactive liability in *Commonwealth Edison* is even more severe than that at issue in *Eastern Enterprises* and because past privity with the Government raises the issue of the taking of a vested contract right, this case provides an excellent vehicle for a majority of the Court to provide guidance on the proper factors to be considered in assessing retroactive legislation under both the Due Process and Takings Clauses.[6]

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concurring in the judgment and dissenting in part). The retroactivity there violated reasonable expectations because of the lack of notice of potential obligations. *See id.* at 530-31 (plurality opinion); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Here, the combination of fixed-price contracts and the 1984 Settlement Agreement created a contractual right not to be exposed to further costs for enriched uranium paid for and delivered decades before. The court below essentially ignored these contractual expectations in contravention of the views of a majority of the Court in *Eastern Enterprises*.

[6] The decision below also categorically held that the Takings Clause never applies to legislation requiring the payment of money, unless a specific fund of money is involved. *See Commonwealth Edison*, 271 F.3d at 1340. This conclusion rests, at least in part, on a stray footnote in *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), to

B. *Commonwealth Edison* Erodes The Finality And Protection That Fixed-Price Contracts Afford Buyers.

The Government and its contracting partners have long understood that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136 (1918). In a fixed-price contract, the seller bears the risk that the actual cost of performance will be greater than anticipated. *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996). Once the contract has been fully performed, the rights, obligations, and risks set forth in the contract become vested property rights because contracts are property. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Accordingly, the Government cannot deprive its business partners "of the fruits actually reduced to possession of contracts lawfully made." *Sinking-Fund Cases*, 99 U.S. 700, 720 (1879).

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the effect that money is "fungible." But as Judge Kozinski has noted regarding *Sperry*, "[n]owhere . . . does the Supreme Court suggest that the government's obligation to pay compensation is eliminated because it takes money rather than real or personal property." *Washington Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 867 (9th Cir. 2001) (Kozinski, J., dissenting). Moreover, in the FCBA's view, the taking in this case is properly conceptualized as the taking of a vested contract right to pay a fixed price for certain goods. Of course, contract rights themselves are property under the Fifth Amendment. *See Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 121 (1924). Even putting the contract aside, the fact that EPACT liability follows possession and use of discrete property (*e.g.*, government-enriched uranium) distinguishes this case from cases like *Eastern Enterprises*. Thus, this case offers the Court a vehicle to address which government actions should be evaluated under the Takings Clause and which are subject to due process analysis.

Commonwealth Edison erodes these vital principles in the law of government contracts. "The bargain struck between the government and [utilities] was simple." *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1582 (Fed. Cir. 1997) (Mayer, C.J., dissenting), *cert. denied*, 524 U.S. 951 (1998). The Government provided enriched uranium to the utilities and they paid a fixed price in return. The fixed price was required to capture all performance costs. *See Barseback Kraft AB v. United States*, 121 F.3d 1475, 1478 (Fed. Cir. 1997) ("[T]he Atomic Energy Act of 1954 . . . provided that 'any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time.'"). When the contracts at issue were formed, the need to decontaminate and decommission the Government's enrichment facilities was well understood. *Commonwealth Edison*, 271 F.3d at 1332, 1349; *see also* Petition for a Writ of Certiorari, *Commonwealth Edison Co. v. United States*, No. 01-1411 at 3-4 n.3 (citing government study that clean-up obligation was known at contract execution and contamination was no greater in 1992 than in the 1960s). Indeed, clean-up costs were an element of the fixed price. *Barseback Kraft AB*, 121 F.3d at 1483.

The utilities were entirely rational in expecting that the Government's price included clean-up costs, or at the very least, that the risk that the fixed prices would cover those costs resided with the Government as the fixed-price seller. This view was confirmed in 1984, when the utilities terminated their existing contracts to replace them with a new "Utility Services Contract." *Commonwealth Edison*, 271 F.3d at 1331. The parties terminated the prior, outstanding contracts through a "Supplemental Agreement of Settlement," *id.*, which provided the utilities with a waiver of liability and further obligation: "'the Government agrees that all obligations arising under the [previous] contracts or by

reason of their termination shall be deemed to be concluded,'" *id.* at 1332 n.3.

Under longstanding contract interpretation and Fifth Amendment principles, Commonwealth Edison had every reason to believe that as a commercial customer of the Government, it bore no obligation beyond the fixed price it had negotiated and paid. It had no reason to believe that it would be the victim of a massive exaction to fund the Government's clean-up of the enrichment plants it had neglected for years after military uses had polluted them. *Maine Yankee Atomic Power Co. v. United States*, 271 F.3d 1357, 1364 (Fed. Cir. 2001) (Friedman, J., concurring). But that is exactly what EPACT did.

Whether viewed through the lens of ordinary contract law or the Fifth Amendment, the risk that the clean-up costs would be greater than anticipated resided squarely with the Government. While this risk assumption embraces increased costs "in the event of unforeseen circumstances," *Dalton*, 98 F.3d at 1305; *see also* John Cibinic, Jr., & Ralph C. Nash, Jr., *Formation of Government Contracts* 1079 (3d ed. 1998) (fixed-price government contract "places the risk of incurring unforeseen costs on the [seller]"), here the costs were actually foreseen; they simply may have been underestimated by the party that agreed to bear them.[7]

Commonwealth Edison compromises years of settled legal principles concerning the exchange of risk under fixed-price contracts. The Government may not "simply shift costs of legislation onto its contracting partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change." *Winstar*, 518 U.S. at 883. This Court should reaffirm the fundamental

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[7] The Federal Circuit's suggestion that the foreseeability of these costs somehow works to the utilities' detriment, *see* 271 F.3d at 1349, is also confusing. That the government knew of the risk and nonetheless offered fixed-price terms only confirms that it knowingly accepted the risk that clean-up costs might exceed its estimates.

principle that "[t]he United States does business on business terms," *United States v. Nat'l Exch. Bank of Baltimore,* 270 U.S. 527, 534 (1926), and this includes assuming the same risks any seller does in a fixed-price contract. Contractors negotiating billions of dollars in contracts with the Government are entitled to clear rules about fixed-price contracts, so that they can adjust their behavior accordingly. Otherwise, *Commonwealth Edison* will have "the untoward result of compromising the Government's practical capacity to make contracts[.]" *Winstar*, 518 U.S. at 884.

C. *Commonwealth Edison* Magnifies Uncertainty About The Unmistakability And Sovereign Acts Doctrines.

As with its treatment of fixed-price contracts, *Commonwealth Edison* leaves tremendous uncertainty in its wake about the applicability of the sovereign acts and unmistakability doctrines. This, in turn, makes it exceedingly difficult for government contractors to negotiate and enter contracts with the Government, because the rules governing them are now unsettled.

By relying on the sovereign acts and unmistakability doctrines to reject Commonwealth Edison's claims that the United States breached its contracts or abrogated vested contract rights under the Fifth Amendment, the Federal Circuit has extended their application to situations they were never intended to address. These doctrines are inextricably tied to situations in which the Government's performance of a contract has been rendered impossible by a public and general governmental act. *See Winstar*, 518 U.S. at 895-96 (plurality opinion); *id.* at 921, 923 (Scalia, J., concurring).

In those circumstances, the Government (like any private contractor) will not be held liable for its nonperformance, unless its own actions caused the impossibility. *Id.* at 895-96. The sovereign acts and

unmistakability doctrines place the Government in the same position as a private contractor by permitting the defense of impossibility where the Government as sovereign has rendered contract performance impossible by the Government as contractor, *unless* it has contractually waived that defense in unmistakable terms. More specifically, the sovereign acts doctrine provides that the impossibility defense is available where a "public and general act[]" prevents the Government's performance of a commercial contract. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). The unmistakability doctrine, in turn, states that even where the act is a sovereign one, if the Government by contract forfeited in unmistakable terms its excuse for nonperformance, the excuse is lost, and the Government must answer in damages. *Winstar*, 518 U.S. at 877-78.

These doctrines have no application here because the contracts were fully performed by both parties. Neither nonperformance nor impossibility is at issue. Rather, the question is whether, after the contracts have been fully performed, the Government may charge the utilities for its increased performance costs, when it expressly assumed that very risk. In concluding that these doctrines apply, the Federal Circuit has "adopt[ed] [a] rule of construction that would weaken the Government's capacity to do business by converting every contract it makes into an arena for unmistakability litigation," a result against which this Court warned. *Id.* at 886. These doctrines were never intended to apply to "humdrum [fully performed] contracts" like these. *Id.* at 880. *See also id.* at 911 (Breyer, J., concurring) ("[b]oth common sense and precedent make clear that an 'unmistakable' promise to bear the risk of a change in the law is not required in every circumstance").

The Federal Circuit's specific application of these doctrines causes further confusion for contractors and their counsel. The Federal Circuit has effectively held that the sovereign acts doctrine will *always* attach to legislation and

insulate the Government from breach *unless* the legislation (or other sovereign act) applies *solely* to the government's contracting partners. *Commonwealth Edison*, 271 F.3d at 1340; *Yankee Atomic Elec. Co.*, 112 F.3d at 1575. The FCBA respectfully suggests that this is not the proper test.

In *Winstar* itself, the legislation did not apply solely to the Government's contracting partners. *Winstar*, 518 U.S. at 902. Nor would the Federal Circuit's test be appropriate: "Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners." *Id.* at 902-03. The test articulated in *Winstar*'s principal opinion focuses, not on the legislative aim, but on its impact and effect: "[A] governmental act will not be public and general if it has the *substantial effect* of releasing the Government from its contractual obligations." *Id.* at 899 (emphasis added).

This test is clearly met here. EPACT's assessment attaches to "purchases" of enriched uranium from the Government. *Commonwealth Edison*, 271 F.3d at 1333. At least eighty-five percent of EPACT's assessments fall on those that procured enriched uranium directly from the Government, with the balance falling on those that bought it from the original puchaser. In fact, unlike the statutory scheme at issue in *Winstar*, EPACT is entirely retroactive. The Federal Circuit's conclusion that "[a]ny impact that this approach may have on those utilities with which the Government had prior contracts is merely incidental to the accomplishment of a broader governmental objective," *Yankee Atomic Elec. Co.*, 112 F.3d at 1576 (internal quotations omitted), cannot withstand scrutiny.[8]

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[8] Even assuming that EPACT was a sovereign act, the Federal Circuit's application of the unmistakability doctrine will create further confusion in the world of government contracts. Given the fixed-price nature of the contracts, the Government's knowledge of its clean-up

II. *COMMONWEALTH EDISON* WILL PROFOUNDLY AND ADVERSELY AFFECT TRANSACTIONS BETWEEN THE GOVERNMENT AND ITS CONTRACTORS.

From a practical standpoint, the Federal Circuit's decision in *Commonwealth Edison* is "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *See Winstar*, 518 U.S. at 883. As this Court has recognized, "expanding the Government's opportunities for contractual abrogation" can have the untoward effect of "undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *See id.* at 884. We respectfully suggest that *Commonwealth Edison* will have precisely that effect.

A. *Commonwealth Edison* Will Adversely Impact The Negotiation And Execution Of Government Contracts.

The Government and its contracting partners "generally rely on contract law 'to reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them.'" *Winstar*, 518 U.S. at 884 n.27 (quoting Richard A. Posner & Andrew M. Rosenfield,

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(Continued . . .)
obligations, the requirement that prices recoup expenses, and the 1984 Settlement Agreement releasing Commonwealth Edison of its obligations under its existing contracts, it is difficult to imagine what more it needed to protect against an exaction triggered by having done business with the Government. *See Winstar*, 518 U.S. at 887 (plurality opinion) (there is "no need for an unmistakably clear 'second promise.'"); *id.* at 921 (Scalia, J., concurring) (there is no need for "a further promise not to go back on the promise to accord favorable regulatory treatment").

Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. Legal Stud. 83, 88-89 (1977)). Indeed, "judicial interpretations of a contractual provision form part of the background against which parties make their contract." *Salsbury Indus. v. United States*, 905 F.2d 1518. 1523 (Fed. Cir. 1990) (Duff, J., dissenting). By creating increased uncertainty in an already unsettled area of the law, *Commonwealth Edison* will force the Government and its contracting partners to incur potentially significant additional expenses in negotiating and executing their contracts.

After *Commonwealth Edison*, the fixed-price terms of a government contract no longer support the expectation that the buyer will pay only that amount, and that the seller assumes the risk that additional expenses may be incurred. Now, a company that has purchased goods or services from the Government may be exposed to liability for additional exactions 40 to 50 years after the transaction. Likewise, a company that purchases a government product from another private company is exposed to that same liability. This is true even if the Government had actual knowledge of the risk at the time it contracted to sell that product.

Nor is it enough, after *Commonwealth Edison*, to rely on a "Settlement Agreement," entered with the Government at the conclusion of performance, indicating that all obligations have been fulfilled. Even where a contractor has paid the agreed price for the Government's goods and services, it will be deemed to have received sufficient "benefit" to expose it to new, massive and wholly retroactive assessments. This is especially true if the area is one of the many in which the Government generally "regulates."

Now government contractors and their counsel must seek to exact concessions to insulate against the risk of future assessments. The contractor must seek, at a minimum, the following agreements: (1) the price is fixed; (2) the contractor will not be subject to any future fee or exaction based on its contract with the Government or its use

of products delivered under such contracts; (3) in the event an exaction is nevertheless imposed, the Government unmistakably agrees to indemnify the contractor; and (4) the government official with whom it negotiates has actual authority to bind the Government to these concessions. Indeed, this last concession alone imposes an onerous burden. *See Commonwealth Edison*, 271 F.3d at 1355 (stating that even if Government officials had represented that "regulatory legislation would not be enacted," that would not suffice because "those authorities had no authority to bind the Government"). This list of new issues raised by the *Commonwealth Edison* decision demonstrates the extent to which it departs from standard contract principles and will deter parties from doing business with the Government.

B. *Commonwealth Edison* Will Adversely Affect The Government's Interests.

Given the difficulty of negotiating and drafting contractual provisions to address all of the contingencies created by *Commonwealth Edison*, the decision will undoubtedly compromise the Government's ability "to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting." *See Winstar*, 518 U.S. at 913 (Breyer, J., concurring).

Commonwealth Edison compromises the vital predictability that previously attached to fixed-price, fully performed government contracts. This, in turn, will increase the risk and costs of government contracting. On one hand, "[f]ear of post-investment opportunism by the government may well deter parties from relying on the government's promises as much as they should for the sake of efficiency." *See* Daniel E. Troy, *Retroactive Legislation* 20 (1998). Some contractors will simply elect not to contract with the Government, and instead turn to other market sources for

supplies, services, and customers. In fact, the option existed here to obtain enriched uranium from alternate sources, an option that utilities likely would have exercised had they believed they would be subjected to EPACT's exaction.

On the other hand, those contractors willing to deal with the Government will demand compensation for assuming the risk that the price paid today for a service or purchase may be significantly raised by the Government tomorrow, thereby factoring that risk into the cost of the contract. Ultimately, of course, it is the Government (*i.e.*, the taxpaying public at large) that must bear these increased costs in government contracting.

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the court acted to mitigate precisely these risks. There, the Court held that federal law preempted state tort law in actions against government contractors who comply with government design specifications, because the application of state tort law "will directly affect the terms of government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507. The same practical reasons require the Court's intervention here.

C. *Commonwealth Edison* Disrupts Investment-Backed Expectations Based Upon Settled Law.

The new test fashioned by the Federal Circuit may permit severely retroactive and costly legislation to withstand constitutional challenge even if the government contractor could not reasonably have expected such legislation. *See Commonwealth Edison*, 271 F.3d at 1345-46. *Commonwealth Edison* thus has immense consequences for government contractors that have already made business decisions—some, like those in this case, involving hundreds

of millions of dollars—in reliance on the well-established principle that the Government cannot retroactively impose liability where none could be reasonably expected. This is especially true where, as here, the underlying contract was for a fixed price and was fully and satisfactorily performed.

Commonwealth Edison noted that even though foreign suppliers of uranium enrichment services emerged in the late 1970s and early 1980s, Commonwealth Edison "elected . . . to continue to use government processing facilities even though . . . foreign alternatives became available." *See Commonwealth Edison*, 271 F.3d at 1331. That decision was informed in large part by the relative costs of foreign and domestic enrichment services. By essentially raising the price paid by Commonwealth Edison for the Government's enrichment services retroactively, EPACT reaches back to alter quite substantially a factor that played no small role in Commonwealth Edison's decision to continue purchasing enrichment services from the Government even after foreign competition arose.

Likewise, the Court of Federal Claims emphasized that the utilities received a "benefit" in that "by purchasing the government's service, the utilities avoided the cost of building and cleaning up its [sic] own plant." *See Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 45 (2000). If anything, this observation underscores the negative consequences that flow from severely retroactive legislation. Any decision by Commonwealth Edison not to invest in "building and cleaning up its own plant" would have been based on whether it would have been more cost-effective at the time to "contract out" that service to the Government based on the Government's price. By raising the cost of the Government's services *ex post*, EPACT may well have nullified the utility's original value assessment. This upsetting of investment-backed expectations is precisely what the general prohibition on severely retroactive laws serves to guard against.

CONCLUSION

For these reasons, *amicus curiae* Federal Circuit Bar Association respectfully urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

GEORGE E. HUTCHINSON
EXECUTIVE DIRECTOR
FEDERAL CIRCUIT
BAR ASSOCIATION
1300 I Street, NW
Suite 700
Washington, DC 20005
202.408.4000

ANDREW G. MCBRIDE
(Counsel of Record)
SCOTT M. MCCALEB
ALLYSON P. NEWTON
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000
Counsel for Amicus Curiae
Federal Circuit Bar
Association

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